

## RS Position on the Appointment of Foreign Judges and Prosecutors in BiH

The appointment of foreign personnel as officials in BiH's institutions is not consistent with a return to constitutional government and the rule of law.

Under BiH's Constitution, except for three judges of the Constitutional Court, there are no provisions for foreigners to serve as officials in BiH's institutions.<sup>1</sup> However, today there are numerous foreign officials who govern BiH's citizens, including judges and prosecutors in BiH's Court and Prosecutor's Office, and other positions within the Registry (with a staff of over 270) that serves both.<sup>2</sup> For example, nearly half of the prosecutors in the section of the Prosecutor's Office for Organized Crime, Economic Crime and Corruption are foreigners, including the Deputy Prosecutor who heads that section.<sup>3</sup> Most of these officials were originally appointed by decision of the High Representative.<sup>4</sup>

These foreign judges and prosecutors are free from the accountability properly imposed on BiH citizens who serve in the same positions. They are granted immunity from criminal and civil liability<sup>5</sup> at the same level as diplomats under the Vienna Convention on Diplomatic Relations.<sup>6</sup> Granting such immunity to judges and prosecutors is contrary to fundamental principles of the rule of law and democratic governance. Unlike diplomats, judges and prosecutors exercise considerable authority and discretion over citizens of BiH, including authority to apprehend, prosecute and incarcerate. Such authority and discretion in any jurisdiction can be abused if not checked by mechanisms of accountability. But there is no accountability for foreign judges and prosecutors in BiH.

This arrangement has resulted in political manipulation of the criminal justice system. Foreign judges in BiH have strong incentives to obey the OHR and other foreign officials who have been involved in setting their terms of work and compensation. Such criminal justice system abuses have been the subject of inquiries raised within BiH's Parliamentary Assembly.

Pursuant to the Law on Court of Bosnia and Herzegovina and the Law on the Prosecutor's Office of Bosnia and Herzegovina, foreigners may serve as judges and prosecutors only during a five-year transitional period, starting in 2004.<sup>7</sup> This transition period comes to an end this year.

The BiH Parliamentary Assembly recently voted to reject amending the law to extend the mandate of these foreign prosecutors and judges. The High Representative on 29 October 2009 expressed his "concern" at the Parliamentary Assembly's decision. He threatened to use his Bonn Powers to extend the mandate, saying that "full BiH co-operation with the ICTY is a priority for my office, and I am ready to use the full powers of my office to assure this if needed."<sup>8</sup> Yet, as the EC's recent Progress Report on BiH attests, BiH's "cooperation with ICTY has remained good."<sup>9</sup>

The Government will oppose any further attempt to change the law to extend the period for foreigners to serve as judges and prosecutors beyond 2009. The High Representative should respect the BiH Parliament's decision not to extend the mandate of the foreign judges and prosecutors. A renewal of their mandate – especially if accomplished through a decree in defiance of the Parliament – would be a giant step back for constitutional government and the rule of law in BiH.

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<sup>1</sup> Constitution of Bosnia and Herzegovina, Art. VI.

<sup>2</sup> Information on judges of the Bosnia's Court is available at [www.sudbih.gov.ba](http://www.sudbih.gov.ba). Information on prosecutors of Bosnia's Prosecutor's Office is available at [www.tuzilastvobih.gov.ba](http://www.tuzilastvobih.gov.ba). Information on the Registry is available at [www.registarbih.gov.ba](http://www.registarbih.gov.ba).

<sup>3</sup> Information on prosecutors of Bosnia's Prosecutor's Office is available at [www.tuzilastvobih.gov.ba](http://www.tuzilastvobih.gov.ba).

<sup>4</sup> *See id.*

The Government reserves its position regarding the legality and enforceability of the immunity in question with respect to non-citizens of Bosnia.

<sup>6</sup> Decision on Granting a Diplomatic Status to the International Members of the Prosecutor's Office in Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina (28/04). The Government reserves its position regarding the constitutionality of this decision. *See also*, Law on Court of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, (29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04, 32/07), which provides criminal and civil immunity for international judges (Art. 65(8)), but no immunity for judges who are citizens of Bosnia. *See also*, Law on the Prosecutor's Office of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, (24/02, 3/03, 37/03, 42/03, 9/04, 35/04, 61/04), which provides criminal and civil immunity for international prosecutors (Art. 18(a)(3)), but no immunity for prosecutors who are citizens of Bosnia.

<sup>7</sup> Law on Court of Bosnia and Herzegovina, "Official Gazette" of Bosnia and Herzegovina, (29/00, 16/02, 24/02, 3/03, 37/03, 42/03, 4/04, 9/04, 35/04, 61/04, 32/07), Art. 65(1). Law on the Prosecutor's Office of Bosnia and Herzegovina, (24/02, 3/03, 37/03, 42/03, 9/04, 35/04, 61/04), Art. 18(a)(1).

<sup>8</sup> OHR Press Release: Inzko Meets Brammertz: International Mandates Should Be Extended, 29 Oct. 2009.

<sup>9</sup> EC Progress Report at 24.

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